IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 11/2007

1. Shri Dileep Mahadev Gauns,
   major of age, residing at
   House No.296, Mathwada,
   Pilgao, Bicholim, Goa
2. Shri Narayan Zalmi,
   major of age, residing at
   Dhatwada, Pilgao,
   Bicholim Taluka,
3. Chandrakant Sawant,
   residing at Gaokarwada,
   Pilgao, Bicholim Taluka
4. Shri Tulsidas Vengurlekar,
   residing at Talwada Pilgao,
   Bicholim Taluka,
5. Shri Mahadev Vengurlekar,
   major of age, residing at
   Tarwada, Pilgao, Bicholim,
6. Shri Krishna Chari
   Residing at Deulwada,
   Pilgao, Bicholim Taluka
7. Shri Prakash Kuttikar,
   residing at Tarwada, Pilgao
   Bicholim Taluka. ..... Petitioners.

V/s.

1. Shri Pradeep Vaikunt Kamat
   major of age, businessman,
   residing at Neura,
   Ilhas, Goa.
2. Shri Mahesh Volvoikar,
   residing at Sarmanos,
   Piligao, Bicholim, Goa. ..... Respondents.

Mr. Valmiki Menezes, Advocate for the petitioners.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. V. Korgaonkar,

Advocate for the respondents.

CORAM : S.K. SHAH, J.

DATE : 22ND FEBRUARY, 2007

ORAL JUDGMENT :

Heard learned Counsel for the petitioners and the respondents. Rule, returnable forthwith and decided finally with the consent of the Counsel.

2. This writ petition challenges the order passed by the trial Court, whereby the learned trial Court rejected the application filed by the defendants for framing additional issues at the stage of arguments.

3. The plaintiffs had filed the suit seeking perpetual injunction restraining the defendants from interfering with the suit property and the fencing constructed by the plaintiffs. It is undisputed fact that the suit property belongs to the plaintiff and he has put up fencing for protection of the suit property. The cause of action for filing the suit arose in the month of May, 1998 as referred in para (4) of the plaint as the defendants started forcibly trespassing into the suit property with malicious intention and damaged the entire fencing, and removed the

wire mesh which was put by the plaintiff to the said fencing.

4. Issues were framed and the evidence was led by both the parties and the matter was posted for arguments. It is at this stage that the defendants filed an application seeking framing of additional issues as, (a) whether the plaintiff has proved the cause of action to file the present suit? and (b) whether the defendants prove that there exists a traditional pathway/access through the middle of the suit property which leads to Sarmanas to Tarwado ?

5. The learned Trial Court rejected this application mainly holding that there is no counter claim filed by the defendants for seeking declaration about right of access. The trial Court also held that the cause of action has already been impleaded by the plaintiff as having arisen on 3rd May, 1998 when the defendants forcibly entered into the suit property and damaged the fencing. It is this order which is challenged in this writ petition.

6. The learned Counsel for the petitioners-defendants contends that it is not necessary to raise counter claim for the purpose of framing additional issue (b), as suggested earlier. He further submits that there have been pleadings both by the plaintiff as also by the

defendants with regard to the access available to the Villagers leading from Sarmanas to Tarwado. He has specifically pointed out para (3) of the plaint and para (6) of the written statement whereby the allegations made in para (3) are dealt with. However, he contends that the issue as suggested by the defendants does arise from the pleadings and it is necessary to frame the issue. He also contends that it is not necessary for the defendants to raise the counter claim for framing this issue, as the issues are required to be framed under Order 14, Rule 1 of the C.P.C. for the material proposition of fact or law made in the plaint and when it is denied in the written statement. However, the learned Counsel for the respondents-plaintiff submits that in fact this issue does not arise at all for the purpose of deciding the suit which simpliciter is for injunction and supported the order passed by the trial Court.

7. Order 14, Rule 1, reads as under :

> " Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other."

8. Having kept this provision in mind, it is also to be borne in mind that the issues are required to be framed for the purpose of deciding the suit in the light of the prayer which is made in the plaint.

The prayer which is made in the plaint is that the defendants be restrained by perpetual injunction from interfering in the suit property and the fencing constructed by the plaintiff to the suit property. This prayer has arisen on the basis of the pleading that the plaintiff is owner of the suit property and he has put the fencing to protect his property and the cause of action for filing this suit has arisen on 3rd May, 1998 when the defendants forcibly trespassed into the suit property and damaged the wire mesh which was put by the plaintiff to the said fencing. It is on this cause of action that the suit has been filed. This being so, the pleadings pertaining to this aspect of the matter alone are required to be considered. It is true that in para 3 of the plaint, the plaintiff has averred that he has put barbed wire fencing around the suit property, leaving foot way of about 1.5 metres in width on its northern side as shown in the plan annexe to the plaint. It is further clarified that this foot way was kept for public for using as an access till the Panchayat constructs new road for the public so that the public should not trespass into the other part of the plaintiff's property. So the pleading is with regard to the leaving foot way on the northern side of the suit property. What the defendants have contended in the written statement is that there is access, passing through the plaintiff's property i.e. through the middle of the suit property, claiming that this foot way is in use since time immemorial. From the facts alleged by the plaintiffs and denied by

the defendants in the written statement, it is not necessary to consider for deciding, the issues that arise between the parties for the purpose of grant of permanent injunction as prayed by the plaintiff. In short, the defendants are claiming right of access passing through the plaintiff's property, claiming that it is available to the Villagers from the time immemorial. Whether such right is available or not, is not at all necessary for deciding the suit and, therefore, the learned trial Judge has rightly rejected the application.

9. I do not find any illegality or impropriety in the order passed by the learned trial Court. Consequently, I do not find any merit in the writ petition. The writ petition is, therefore, dismissed. Rules is discharged. No order as to costs.

S.K. SHAH, J.

ssm.